

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case
32-CA-214300

Date Filed
2/5/2018

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Tesla, Inc.

b. Tel. No.

c. Cell No.

f. Fax No.

d. Address (Street, city, state, and ZIP code)

45500 Fremont Boulevard
Fremont, California 94538

e. Employer Representative

(b) (6), (b) (7)(C)

g. e-Mail

(b) (6), (b) (7)(C)@tesla.com

h. Number of workers employed
10,000

i. Type of Establishment (factory, mine, wholesaler, etc.)
Factory

j. Identify principal product or service
Automotive Manufacturing

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Within the past six months and ongoing, Tesla, Inc. has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act by, among other things, terminating and/or disciplining employees in retaliation for participating in protected concerted activities and National Labor Relations Board activities.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO

4a. Address (Street and number, city, state, and ZIP code)

8000 East Jefferson
Detroit, Michigan 48214

4b. Tel. No. (313) 926-5000

4c. Cell No.

4d. Fax No.

4e. e-Mail

sreed@uaw.net

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

Tel. No. (323) 655-4700

Office, if any, Cell No.

Fax No. (323) 655-4488

e-Mail

margo@ssdslaw.com

By Margo A. Feinberg, Esq.
(signature of representative or person making charge)

Margo A. Feinberg, Esq.,
Attorney for Charging Party
(Print/type name and title or office, if any)

Schwartz, Steinsapir, Dohrmann & Sommers LLP
6300 Wilshire Blvd., Suite 2000, Los Angeles, CA 90048

2/5/18
(date)

Address

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.



Littler Mendelson, P.C.
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February 22, 2018

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VIA EFILE AND EMAIL

Edris Rodriguez Ritchie, Esq.
Field Attorney
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Re: Tesla, Inc.
NLRB Case No. 32-CA-214300

Dear Mr. Rodriguez Ritchie:

We represent Tesla in the above-referenced matter. This letter constitutes Tesla's statement of position in Case No. 32-CA-214300 and responds specifically to your letter dated February 12, 2018 and the email you sent on Friday, February 16, 2018. By submitting this position statement, Tesla in no way waives its right to present new or additional facts or arguments. If the facts described in this position statement are different from those discovered during your investigation, we request that you notify us of any areas of disagreement so that we may further address those matters.

This position statement does not constitute an affidavit, and is not intended to be used as evidence of any kind in any agency or court proceedings in connection with these charges. Tesla provides this information in cooperation with the Region's investigation. However, as the Region is aware, maintaining the confidentiality of this responsive information is critical in this case because litigation is pending in other forums regarding certain allegations raised in your February 12, 2018 letter. Tesla also provides this statement of position with the understanding that its contents and attachments are confidential and proprietary and, consistent with NLRB rules, practices and policies, that its contents and the accompanying exhibits will not be disclosed, or given to the International Union, United Automobile, Aerospace and Agricultural Workers of America, AFL-CIO ("UAW," "Union" or "Charging Party"), or any attorney or representative it may have.

As described in your letter of February 12, 2018, the Union's Charge concerns two allegations: (1) that the Company engaged in a "mass discharge" of employees at Tesla's facilities in order to discourage employees from engaging in protected activities; and (2) that the Company discharged (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) for their purported protected concerted activities and/or Union activities. In the email you sent on February 16, 2018, you attached

another letter which contained an additional, and new, allegation: that in (b) (6), (b) (7)(C) 2017, (b) (6), (b) (7)(C) threatened employees with plant closure if the Union became the collective bargaining representative. None of the allegations have any merit.

(1) There is No Merit to the Union's "Mass Discharge" Allegation.

The Union's "mass discharge" allegation is a repetition of its contention in Case No. 32-CA-208614 that the Company's implementation of changes in its Performance Management Program process in the fall of 2017 was a subterfuge to get rid of Union supporters. You have informed us that the Union's contention is the same in both cases.

In connection with Case No. 32-CA-214300, the Region has taken the affidavit of (b) (6), (b) (7)(C), (b) (6), (b) (7)(C), (b) (7)(D), who initiated and oversaw the changes in the Performance Management Program. In addition, the Company has provided the Region with the sworn declaration of (b) (6), (b) (7)(C) who was part of the team that developed the criteria and was responsible for analyzing the data and impact of changes in the Performance Management Program. Finally, the Company has provided the Region with extensive documentation concerning the creation and implementation of the changes in the Performance Management Program. The witnesses' testimony and the extensive documentation already given to the Region constitute overwhelming evidence that the purpose of the changes in the Performance Management Program was purely business-related and that the modified Performance Management Program had nothing to do with the Union's organizing campaign or the employees' concerted activities.

As reflected in (b) (6), (b) (7)(C) affidavit, (b) (6), (b) (7)(C) started working for Tesla on (b) (6), (b) (7)(C) as the (b) (6), (b) (7)(C) — (b) (6), (b) (7)(C) in the Company's (b) (6), (b) (7)(C) organization. (b) (6), (b) (7)(C) came to Tesla from the (b) (6), (b) (7)(C), where (b) (6), (b) (7)(C) had revised that company's performance management system. Before (b) (6), (b) (7)(C) work at (b) (6), (b) (7)(C) had been heavily involved in revising and implementing performance management systems at other major companies, including Microsoft. All of those companies use performance management as a means of ensuring that only top-performing employees were retained.

Arriving at Tesla, (b) (6), (b) (7)(C) found an unacceptably high number of employee complaints concerning interpersonal treatment. (b) (6), (b) (7)(C) concluded that Tesla's rapid growth had resulted in the hiring of some employees who were "behaving badly" and should not be allowed to remain with the Company. (b) (6), (b) (7)(C) was concerned that the employees' behavior, in addition to being potentially unlawful, could adversely affect employee morale, production, and the Company's brand.

Accordingly, (b) (6), (b) (7)(C), with the concurrence of the Company's Executive Staff, created the Tesla Academy to better train managers and improve new hire orientation. (b) (6), (b) (7)(C) also added an independent Employee Relations Investigation Team that was tasked with quickly and

thoroughly investigating work place complaints. Finally, and most importantly for this matter, (b) (6), (b) (7)(C) revamped the Company's Performance Management Program.

(b) (6), (b) (7)(C) concluded that Tesla's Performance Management Program, which was in place when (b) (6), (b) (7)(C) arrived, relied too heavily on the "what" of employees' performance, simply measuring the quantity and quality of production. (b) (6), (b) (7)(C) found that the existing performance management system did not sufficiently consider the "how" of employee activity, including the way employees interact with each other and work together as a team. (b) (6), (b) (7)(C) concluded that the existing Performance Management Program enabled the retention of employees who negatively affected a collaborative culture.

Accordingly, (b) (6), (b) (7)(C) directed (b) (6), (b) (7)(C), (b) (6), (b) (7)(C), to determine whether enough information regarding the "how" of employee performance could be extracted from the evaluations that had just been performed for the first half of 2017. (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) team concluded that the desired information could not adequately be extracted from the existing evaluations. Instead, (b) (6), (b) (7)(C) concluded that it would be necessary to conduct a supplemental evaluation, adding new criteria focusing on the "how" of production, including teamwork, collaboration and trustworthiness. (b) (6), (b) (7)(C) working with a group of HR business partners, a representative from the legal department and, occasionally, (b) (6), (b) (7)(C) developed the criteria that were eventually included in the Supplemental Performance Review form.

On (b) (6), (b) (7)(C), 2017, (b) (6), (b) (7)(C) sent an email to the departments that reported to (b) (6), (b) (7)(C) regarding the roll out of the Supplemental Performance Review process. (**Exhibit A.**) That email clearly stated the purpose of the Supplemental Performance Review:

The Executive Team and I have been discussing what it means to balance high performance and teamwork, and believe the time is right to make a change in how we measure how we contribute. We need you to help make sure our employees are not just high performers, but also achieve results in a way that does not negatively impact our ability to collaborate and creates a great environment to work in. It is imperative that we build a culture and workplace with managers and employees who act with high integrity and live fair-minded values each day. (*Id.*)

The same message was distributed to all of Company's managers and supervisors. On (b) (6), (b) (7)(C) 2017, (b) (6), (b) (7)(C) reminded all employees of the need to complete Supplemental Performance Reviews and restated the purpose of that initiative:

At Tesla, we don't just value high performance but also how we achieve results. We want to build a culture where we hold ourselves accountable for operating with high integrity, teamwork, and in a way that helps create a positive work environment. The effect our actions have on teams and each other is critical to

our company's success. It is for this reason that we have asked all of you to help us measure these qualities for our employees and managers. **(Exhibit B.)**

The Company also issued a Frequently Asked Questions ("FAQ") sheet to the HR staff so that they could answer questions that might arise concerning the Supplemental Performance Review process. **(Exhibit C.)** Once again, the purpose of the Supplemental Performance Review was made clear:

This is an enhancement to our existing performance management process, and a recognition that how results get achieved is valued as much as the actual results.
(Id.)

In (b) (6), (b) (7)(C) 2017, after the supplemental evaluations had been completed, (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) team analyzed the impact that terminating employees, based on various scores, would have on the employee population. For example, in a (b) (6), (b) (7)(C) 2017 email, (b) (6), (b) (7)(C) reported that if the Company terminated all employees who had 6 or more months of service and received a score of 1 or 2, there would be 2,000 employees terminated. **(Exhibit D.)**

Between (b) (6), (b) (7)(C) 2017, (b) (6), (b) (7)(C) met with (b) (6), (b) (7)(C) and others on the working team, and reviewed the impact of various possible scoring scenarios. While they decided to make non-production employees who had a "1" or "2" rating subject to termination, they decided not to terminate production employees who had a single first time "2" rating for two reasons. First, the twice-per-year evaluation cycle for production employees would give employees a chance to improve their performance and the Company the ability to quickly evaluate employees' progress (in contrast to the once-per-year evaluation cycle for other employees). Second, terminating 2,000 employees would have had too great an impact on production; the Company needed to ramp up production for the new Model 3 and the Company would have had difficulty finding replacements for 2,000 terminated employees. Third, termination of 2,000 employees would negatively affect the brand, as Tesla would be associated with a mass exodus of employees. The decision not to terminate production employees, who had a one-time rating of "2", resulted in bringing the total number of employees who would be terminated down to approximately 700 Company-wide.

Although the Company had used performance improvement plans ("PIPs") in the past, (b) (6), (b) (7)(C) decided not to use them in conjunction with the implementation of the Supplemental Performance Review because (b) (6), (b) (7)(C) did not favor PIPs and concluded that (b) (6), (b) (7)(C) HR team did not have the capacity at that time to engage in a complicated PIP process.

From the foregoing, it is clear that the Company gave no consideration whatsoever to the Union organizing drive in developing and implementing the changes in the Performance Management Program. Neither the Union nor the organizing campaign was mentioned once in the voluminous correspondence concerning changes in the Performance Management Program. Rather, the Company was motivated solely by its desire to improve its work force by placing

greater emphasis in the review process on how employees perform their jobs and how they interact with fellow workers. These are entirely legitimate business considerations. Indeed, as discussed in our December 12, 2017 position statement, there is a significant body of literature recognizing the importance of focusing on the “how” of production in the modern workplace.¹

The only conclusion that can be drawn from the testimony of (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) and the documents created during the revision of the Performance Management Program is that consideration of the Union played no role in that revision. This conclusion is confirmed by the statistics, which show clearly that the revision in the Performance Management Program treated production employees—the very group of employees in which the Union was waging its organizing drive—more favorably than other employees.

- 1.1% of U.S. hourly employees (87 of 8,225 employees) in production and maintenance were terminated.
- 1.5% of U.S. managers and supervisors (43 of 2,643 employees) were terminated.
- 3.4% of U.S. non-production and maintenance employees (549 of 16,280 employees) were terminated.

¹ Behavior goals are a standard component of most performance review systems. See *Managing Employee Performance, SHRM Toolkit* (September 17, 2015) available at <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managingemployeeperformance.aspx>. Understanding the actions and behaviors that employees can use to perform the job is often as important to success as end results. Behavior is the day-to-day activity in which people engage to produce results and relates closely to the process side of work.

Focusing on the way people go about their work is based on the belief that doing things correctly will lead to positive organizational results. University of California Berkeley Human Resources, *Performance Expectations = Results + Actions & Behaviors* available at <https://hr.berkeley.edu/hr-network/central-guide-managing-hr/managing-hr/managing-successfully/performance-management/planning/expectations>; In performance review, behaviors are presented in a range of different ways and bear names that range from *success factors* to *behavioral competencies* to simply *performance components*. They typically address things like teamwork, creativity, adaptability and initiative, and are measured with behaviorally anchored scales (defining different levels of what it looks like to exhibit these behaviors on the job). Behaviors are often referred to as the *how* of an employee's performance, since they address *how* an individual goes about their work (i.e. being collaborative or cutthroat). Compensation Force, *Performance Management: Measuring Behaviors Versus Outcomes* available at http://www.compensationforce.com/2006/07/performance_man.html

- 15% of U.S. production employees (1,261 of 8,223 employees) received promotions.
- 49% of production employees (4,040 of 8,223 employees) received performance awards.
- Non-production employees who received a one time score of 2 were subject to termination. Production employees who received a one time score of 2 were not eligible for termination.
- The same system of evaluation was applied throughout the entire Company (from top to bottom, including upward feedback from employees to their managers).

(2) Tesla Lawfully Terminated (b) (6), (b) (7)(C) for Failing to Meet the Company's Objective Performance Standards

The Union has selected a handful of the employees who were terminated as a result of the changes in the Performance Management Program and claimed that they—unlike their over 700 co-workers who were also terminated company-wide—were chosen for termination because they engaged in concerted or union activity. The present charge adds two employees ((b) (6), (b) (7)(C)) to the (b) (6), (b) (7)(C) employees cited in the Union's initial charge. As with the (b) (6), (b) (7)(C) employees cited in the initial charge, (b) (6), (b) (7)(C) were terminated because their performance history met the objective criteria of the Performance Management Program for termination with two "2s" on their most recent evaluations.

A. Legal Standard

The National Labor Relations Act ("NLRA" or "Act") prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). The Board has established a test for analyzing alleged violations of Sections 8(a)(1) and (3) of the Act. *Wright Line Inc.*, 251 NLRB 1083, 1089 (1980), *enfd*, 662 F.2d 899 (1st Cir. 1981). Under the *Wright Line* test, a charging party must initially "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Id.* To demonstrate a *prima facie* case, the charging party must show union or protected concerted activity by the employee and employer knowledge of that activity.

If, and only if, the charging party makes out a *prima facie* case, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089. An employer may show it would have made the same personnel decision based on legitimate reasons regardless of the employee's

protected activity.² The question is not whether the employer's asserted reasons make sound business sense. An employer need only show that it was honestly motivated by legitimate, non-discriminatory business reasons. *Ryder Dist'n Resources, Inc.*, 311 NLRB 814, 816-17 (1993).³ Throughout this analysis, the ultimate burden remains on the charging party to prove the elements of an unfair labor practice by a preponderance of the evidence. *Wright Line, supra*, 251 NLRB at 1088, n. 11.

To establish that an individual performance review is discriminatory, the union must establish a *prima facie* case that the employee's union activities were a substantial or motivating factor in giving the negative review. *In Re Starbucks Corp.*, 354 NLRB 876, 926 (2009). An evaluation will be found discriminatory where the employer cannot show that it would have administered the same evaluation even in the absence of union activity. *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 543 (2003). When performance reviews are given as part of a company-wide evaluation system, the Board has found that "it is not for the Board to substitute its judgment for that of an employer regarding the merits of an employee's job performance, absent, of course, convincing evidence that the employer's appraisal was improperly motivated by union considerations." *N. Kingstown Nursing Care Center*, 244 NLRB 54, 68-69 (1979).

Here, the facts demonstrate that Tesla lawfully applied its objective Company-wide standards during its 2017 performance evaluations to further its goals of keeping the best talent to ensure its success as a provider of sustainable vehicles. Accordingly, the allegations concerning the Company's Performance Management Program should be dismissed.

B. Tesla Lawfully Terminated (b) (6), (b) (7)(C) under its Performance Management Program

The Union contends that Tesla terminated (b) (6), (b) (7)(C) in retaliation for (b) (6), (b) (7)(C) protected activity. Tesla terminated (b) (6), (b) (7)(C) because (b) (6), (b) (7)(C) performance history met the objective criteria of the Performance Management Program for termination with two "2s" on (b) (6), (b) (7)(C) most recent evaluations.

In (b) (6), (b) (7)(C) review for the 2nd half of 2016, which was prepared by (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) received a "2" rating. (Exhibit E.) In (b) (6), (b) (7)(C) review for the 1st half of 2017, which was by (b) (6), (b) (7)(C) also received a "2" rating. (Exhibit F.) And in (b) (6), (b) (7)(C)

² See *Wright Line*, 251 NLRB 1083; see also *Hunter Douglas, Inc.*, 277 NLRB 144 (1985); *Hyatt Regency Memphis*, 296 NLRB 259 (1989).

³ See also *Liberty Homes, Inc.*, 257 NLRB 1411, 1412 (1981) (explaining that the Board should not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated); *Super Tire Stores*, 236 NLRB 877, 877 n.1 (1978) (stating that "Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent's position").

Supplemental Performance Review in the fall of 2017, which was prepared by (b) (6), (b) (7)(C) received two "seldom" ratings—for "positive impact" and "teamwork." (**Exhibit G.**)

The scores on (b) (6), (b) (7)(C) review for the 1st half of 2017 and on (b) (6), (b) (7)(C) Supplemental Performance Review were due to (b) (6), (b) (7)(C) receiving a Verbal Warning for attendance in (b) (6), (b) (7)(C) 2017 and a Written Warning for attendance in (b) (6), (b) (7)(C) 2017. (**Exhibit H.**) This attendance policy allows a verbal or written warning for two attendance occurrences because attendance is critical to the assembly line production process.⁴ This discipline was noted in (b) (6), (b) (7)(C) 1st half of 2017 review under "Collaborative and Dependable." (b) (6), (b) (7)(C) also admitted (b) (6), (b) (7)(C) attendance problems on this section of (b) (6), (b) (7)(C) review. (**Exhibit F.**) Both of these warnings had been preceded by a notation in (b) (6), (b) (7)(C) evaluation for the 1st half of 2016, that (b) (6), (b) (7)(C) attendance needed improvement. (**Exhibit E.**) In addition to the occurrences shown on the written warning, (b) (6), (b) (7)(C) time records show (b) (6), (b) (7)(C) attendance issues continued. (**Exhibit I.**) (b) (6), (b) (7)(C) also received a verbal warning on (b) (6), (b) (7)(C) 2017 for failing to punch in when (b) (6), (b) (7)(C) returned from lunch. (**Exhibit J.**) Tesla has an attendance policy that is applicable to all hourly employees working in the United States. (**Exhibit K.**)

As discussed in the December 12, 2017 position statement, Tesla terminated other employees with similar attendance issues during the performance review process. As just one example, an employee was terminated who received a "2" on both the 2017 and the second-half 2016 performance reviews reflecting attendance issues. (**Exhibit L.**) (b) (6), (b) (7)(C) rating remained a "2" with the supplemental evaluation. On (b) (6), (b) (7)(C) first half 2017 review, (b) (6), (b) (7)(C) received all "3s," except in Collaborative and Dependable. That section noted that (b) (6), (b) (7)(C) needed to "continue to work on showing up on time to work verbal warning issued (b) (6), (b) (7)(C) 17." In the second half of 2016, as a result of (b) (6), (b) (7)(C) attendance issues, (b) (6), (b) (7)(C) goal for (b) (6), (b) (7)(C) performance was "no attendance issues." This employee also received a written warning on (b) (6), (b) (7)(C) 2017 for being late two times. The warning noted (b) (6), (b) (7)(C) pattern of being late, leaving early, or being absent. (b) (6), (b) (7)(C) was terminated despite receiving all "Often's" on (b) (6), (b) (7)(C) supplemental review. These consistent attendance warnings and terminations clearly show that Tesla treated (b) (6), (b) (7)(C) the same as other employees with attendance issues.

In addition to (b) (6), (b) (7)(C) attendance, two interactions with (b) (6), (b) (7)(C), shortly before (b) (6), (b) (7)(C) prepared the Supplemental Performance Review caused (b) (6), (b) (7)(C) to give (b) (6), (b) (7)(C) two "seldom" ratings on the Review.

(b) (6), (b) (7)(C) applied for, but failed to receive, (b) (6), (b) (7)(C) When (b) (6), (b) (7)(C) earned of (b) (6), (b) (7)(C) rejection, (b) (6), (b) (7)(C) went to (b) (6), (b) (7)(C) and pounded angrily on (b) (6), (b) (7)(C) desk, while screaming and crying. (b) (6), (b) (7)(C) understandably, viewed that conduct as highly unprofessional. Indeed, about a month ago—long after (b) (6), (b) (7)(C) termination (b) (6), (b) (7)(C) called (b) (6), (b) (7)(C) acknowledged (b) (6), (b) (7)(C) behavior was inappropriate, and apologized for it.

⁴ There is no allegation in the charge that this underlying discipline was unlawful.

(b) (6), (b) (7)(C) had also sought to become a (b) (6), (b) (7)(C). During the training for this position, (b) (6), (b) (7)(C) received constructive criticism from (b) (6), (b) (7)(C) fellow workers concerning (b) (6), (b) (7)(C) work. (b) (6), (b) (7)(C) reaction was to walk off the line, rather than to correct (b) (6), (b) (7)(C) performance. Based on these incidents, (b) (6), (b) (7)(C) reasonably concluded that (b) (6), (b) (7)(C) would not accept constructive criticism from (b) (6), (b) (7)(C) peers, and thus, (b) (6), (b) (7)(C) gave (b) (6), (b) (7)(C) two "seldom" ratings on the Supplemental Performance Review.

As a production employee with two "2s" in (b) (6), (b) (7)(C) most recent evaluation, (b) (6), (b) (7)(C) was subject to termination under the revised Performance Management Program. Tesla terminated (b) (6), (b) (7)(C) on (b) (6), (b) (7)(C) 2017 for Performance. (Exhibit M.) (b) (6), (b) (7)(C) attendance problems, (b) (6), (b) (7)(C) unprofessional conduct (which (b) (6), (b) (7)(C) subsequently acknowledged) and (b) (6), (b) (7)(C) consequent low scores on (b) (6), (b) (7)(C) evaluations were the reason for (b) (6), (b) (7)(C) termination, not any protected activity on his part.

C. Tesla Lawfully Terminated (b) (6), (b) (7)(C) under its Performance Management Program

The Union contends that Tesla terminated (b) (6), (b) (7)(C) in retaliation for (b) (6), (b) (7)(C) protected activity. In fact, Tesla terminated (b) (6), (b) (7)(C) because (b) (6), (b) (7)(C) performance history met the objective criteria of the Performance Management Program for termination with two "2s" on (b) (6), (b) (7)(C) most recent evaluations. In (b) (6), (b) (7)(C) review for the 2nd half of 2016, which was prepared by (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) received a "2" rating. (Exhibit N.) During this review period, (b) (6), (b) (7)(C) received a verbal warning for quality issues. (Exhibit O.) In (b) (6), (b) (7)(C) review for the 1st half of 2017, which was prepared by (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) also received a "2" rating (with an exceptionally low "1" rating for "mindset"). (Exhibit P.) And in (b) (6), (b) (7)(C) Supplemental Performance Review in the Fall of 2017, which was prepared by (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) received two "seldom" ratings – in the categories of Attitude and Positive Impact. (Exhibit Q.)

The low "1" score given to (b) (6), (b) (7)(C) in (b) (6), (b) (7)(C) 1st Half 2017 Performance Review and the two "seldoms" in (b) (6), (b) (7)(C) Supplemental Performance Review were based on (b) (6), (b) (7)(C) refusal to accept responsibility for errors and (b) (6), (b) (7)(C) poor relations with lead personnel. When (b) (6), (b) (7)(C) was passed over for (b) (6), (b) (7)(C) reacted by arguing with the leads about who was responsible for quality. When errors were noted with respect to (b) (6), (b) (7)(C) work product, (b) (6), (b) (7)(C) response was, "That's a lead issue; (b) (6), (b) (7)(C)" "That's for the red shirts to figure out." (b) (6), (b) (7)(C) refused to take responsibility for defects, claiming that others were to blame, as "I must have been on break," at the time the defects occurred. (b) (6), (b) (7)(C) was not receptive to constructive feedback, and did not help other employees. If other employees were behind, instead of helping them, (b) (6), (b) (7)(C) criticized them: in one instance, (b) (6), (b) (7)(C) called a slower employee "a retard."

(b) (6), (b) (7)(C) had continuing performance problems even after (b) (6), (b) (7)(C) performance reviews were completed. On (b) (6), (b) (7)(C) 2017, Employee Relations received a complaint that (b) (6), (b) (7)(C) had been involved in an altercation with another employee (b) (6), (b) (7)(C) while (b) (6), (b) (7)(C) was on shift.

(b) (6), (b) (7)(C) alleged that (b) (6), (b) (7)(C) told him, "Fuck you, motherfucker, I'll beat you up" and continued to reference "meeting at McDonald's" in a manner obviously intended to incite violence. (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) interviewed (b) (6), (b) (7)(C) who stated that (b) (6), (b) (7)(C) returned from break to find (b) (6), (b) (7)(C) at (b) (6), (b) (7)(C) work station. (b) (6), (b) (7)(C) asked (b) (6), (b) (7)(C) why (b) (6), (b) (7)(C) was there and (b) (6), (b) (7)(C) started "going off." (b) (6), (b) (7)(C) admitted to respond "we can go outside" and using obscenities during the altercation. (b) (6), (b) (7)(C) also admitted to teasing (b) (6), (b) (7)(C) called (b) (6), (b) (7)(C) "turtle" because (b) (6), (b) (7)(C) worked slowly. Based on (b) (6), (b) (7)(C) investigation, (b) (6), (b) (7)(C) recommended the termination of (b) (6), (b) (7)(C) as the instigator of the incident threatening violence in the workplace and a final warning for (b) (6), (b) (7)(C) for responding to (b) (6), (b) (7)(C) in a threatening manner, using obscenities and teasing. Tesla planned to issue a final written warning to (b) (6), (b) (7)(C) for the incident, but (b) (6), (b) (7)(C) was exited on performance reviews before the discipline could be given.

As a production employee with two "2s" in (b) (6), (b) (7)(C) most recent evaluations, (b) (6), (b) (7)(C) was subject to termination under the revised Performance Management Program. Tesla terminated (b) (6), (b) (7)(C) on (b) (6), (b) (7)(C) 2017 for performance reasons. (Exhibit R.) (b) (6), (b) (7)(C) refusal to take ownership for quality and (b) (6), (b) (7)(C) consequent low scores on (b) (6), (b) (7)(C) evaluations were the reasons for termination, not any purported protected activity on his part.

(3) (b) (6), (b) (7)(C) Did Not Threaten Employees with Plant Closure if the Union Became the Employees' Bargaining Representative

After months of investigation, we were informed on the afternoon of Friday, February 16, 2018 of an entirely new allegation: that on an unstated date in (b) (6), (b) (7)(C) at a team meeting at the Fremont facility, (b) (6), (b) (7)(C), "made unlawful threats of plant closure if the union became the collective bargaining representative." The Company objects to the impossibly short time it has been given to respond to this entirely new allegation. Although the Board Agent's letter is dated February 12, 2018, this "follow-up" letter was not emailed to the company's attorney until February 16, 2018, giving Tesla less than six days to investigate and respond to this allegation. Given more detail concerning the allegation and more time to investigate it, the Employer is confident it could present the Region with additional compelling evidence that the allegation has no merit.

In any event, it should be noted that this last-minute allegation is time-barred by Section 10(b)'s six-month statute of limitations.

Moreover, the charge has no substantive merit. (b) (6), (b) (7)(C) holds "start up" meetings with (b) (6), (b) (7)(C) team every day. (b) (6), (b) (7)(C) is adamant that not once has plant closure been a topic in those meetings.

⁵⁵ (b) (6), (b) (7)(C), who was the subject of an earlier charge, was terminated on (b) (6), (b) (7)(C) 2017 for (b) (6), (b) (7)(C) involvement in this altercation.

Edris Rodriguez Ritchie, Esq.
February 22, 2018
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For these reasons, the Region should dismiss this last-minute, baseless allegation.

CONCLUSION

As explained above, there are no comments, documents or statistics that support the Union's charge regarding the Performance Management Program. Similarly, the evidence shows that (b) (6), (b) (7)(C) were terminated in accordance with the consistently applied criteria of the Performance Management Program. Accordingly, those allegations should be dismissed in their entirety. Finally, the last minute allegation concerning threats of plant closure should be dismissed – or, at the very least, the Company should be given additional time to respond.

Very truly yours,

/s/ John M. Skonberg

John M. Skonberg

Attachments



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

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March 29, 2018

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Re: Tesla, Inc.
Case 32-CA-214300

Dear Mr. Skonberg:

This is to advise you that I have approved the withdrawal of the charge in the above matter.

Very truly yours,

A handwritten signature in black ink that reads "Valerie Hardy-Mahoney".

Valerie Hardy-Mahoney
Regional Director

cc:

(b) (6), (b) (7)(C)

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